STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

RENTON EDUCATION ASSOCIATION Complainant, vs. RENTON SCHOOL DISTRICT NO. 403 Respondent.	Case No. 843-U-77-99 Decision No. 706 EDUC DECISION AND ORDER

APPEARANCES:

Symone B. Scales, Staff Counsel, Washington Education Association, for the complainant.

Montgomery, Purdue, Blankinship and Austin, by George W. Akers, Attorney at Law, for the respondent.

STATEMENT OF THE CASE:

The complaint presents four issues for determination.1/ The Renton Education Association (REA) alleges that the district refused to bargain collectively in good faith in violation of RCW 41.59.140(1)(e) and interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in RCW 41.59.060, in violation of RCW 41.59.140(1)(a), by (1) refusing to bargain concerning a classroom visitation policy which it unilaterally adopted, (2) refusing to bargain over and unilaterally implementing a transfer of unit work to non-unit employees, (3) refusing to bargain over and unilaterally adopting a rate of pay for substitute teachers, and (4) unilaterally making changes in the contract agreed upon by the parties. A hearing was held before Examiner Alan R. Krebs, on October 25, 27 and 30, 1978.

DISCUSSION:

Classroom Visitation Policy

In May, 1976, as a result of the district's denial of a parent's request to visit a classroom, the parent filed suit against the district. The suit challenged the written policy of the district

1/ A fifth allegation contained in the complaint was withdrawn by the complainant at the hearing.

which limited parental visits to observe instruction, to an annual open house visit. The suit was publicized in the community newspaper. By letter dated August 13, 1976, the president of the REA, Pamela J. Bennett, informed the board that the REA was following the developments and noted that the REA had not been asked to negotiate a new visitation policy. The district superintendent, Dr. Gary Kohlwes, prepared a draft of a revised visitation policy and, on October 7, 1976, submitted it to the school board for first reading. Between October 7, 1976 and October 21, 1976, when the board was to consider the revised policy for formal action, Kohlwes made changes in his draft. On October 18, 1976, Bennett wrote Kohlwes:

> "As we discussed by phone and across the negotiations table this past weekend, the Renton Education Association wishes to negotiate with the District regarding proposed policy changes regarding classroom visitations.
>
> It is our understanding that this policy has been discussed by the School Board and we wish to negotiate prior to any discussion of or actual final adoption."

At collective bargaining negotiations between the district and the REA which were then in progress, the REA indicated that it considered that any change in the visitation policy was a negotiable matter. The district responded that it was not required to, and would not, negotiate a visitation policy. The parties signed a collective bargaining agreement on October 28, 1976, which made no mention of a visitation policy.

On October 21, 1978, Putnam Little, the chief spokesman for the REA negotiating team, spoke informally with Billy Fogg, the district's director of labor relations. Fogg explained to Little the revised visitation policy that would be voted on by the board that evening. Fogg testified that this explanation could not be construed as negotiations. According to Fogg, Little responded that he didn't think that the REA would have any problem with the proposed policy or would pursue the matter any further. Little testified that he never indicated to Fogg that the policy was acceptable. He stated that he informed Fogg that the REA's position was that visitation policy had to be negotiated. Fogg recalled no such statement.

That evening the board, after making further revisions in the draft, adopted the revised visitation policy and regulations.

The new visitation policy provided the following guidelines:

"1. visitors desiring to visit a classroom must inform the building principal or program supervisor of that desire not less than one day prior to the date on which visitation is requested, unless mutually agreeable to the classroom teacher and principal or program supervisor;

2. visitors are encouraged to share with school personnel the purpose for the visit so that optimum assistance may be provided;

3. entrance to secondary level classrooms (grades 7 through 12) shall be prior to the initiation of the class period and the visitor shall remain until the conclusion of such period. At the elementary level (grades K through 6) entrance shall be during a natural break in instruction or during transition from one subject area to another, and the visitor shall remain for the length of that particular instructional area;

4. classroom visitation must not detract from planned classroom activity. Visitors must refrain from talking, gesturing, moving about the room, commenting or making requests while in the classroom;

5. visitors shall sit where requested by the teacher;

6. visitors shall not participate in classroom activities unless specifically requested to do so by the teacher;

7. visitors shall not use electronic equipment or distracting procedures in recording classroom activities;

8. unless visitations are in conjunction with an invitation to attend special classroom functions, the number of visitors at any one time for any classroom shall not exceed two persons;

9. no individual visitor shall be allowed more than three visits per month to a particular classroom;

10. during certain classroom activities, such as student examinations or presentations, it may not be appropriate for visitation and requests to visit may be denied;

11. under certain circumstances a special education classroom may not be available for visitation, and requests to visit may be denied; and

12. upon written request, the reason(s) for denying a classroom visitation will be given in writing by the building principal or program

> supervisor within three working days, to the person denied visitation, which shall state the procedures available for appeal of that denial."

On November 3, 1976, Bennett requested, in writing, that the policy on classroom visitation be moved for reconsideration by the school board and then be the subject of negotiations between the district and the REA. Following the district's refusal of the association's timely request to negotiate the change in visitation policy the REA made no unequivocal waiver of its request.

RCW 41.59.140(1) provides:

> "It shall be an unfair labor practice for an employer:
>
> (a) To interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in RCW 41.59.060.
>
> * * *
>
> (e) To refuse to bargain collectively with the representatives of its employees."

RCW 41.59.060(1) provides:

> "Employees shall have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing..."

The term "collective bargaining" is defined in RCW 41.59.020(1) as:

> "...the performance of the mutual obligations of the representatives of the employer and the exclusive bargaining representative to meet at reasonable times in light of the time limitations of the buget-making process, and to bargain in good faith in an effort to reach agreement with respect to the wages, hours and terms and conditions of employment: Provided, that prior law, practice or interpretation, shall be neither restrictive, expansive, nor determinative with respect to the scope of bargaining. A written contract incorporating any agreements reached shall be executed if requested by either party. The obligation to bargain does not compel either party to agree to a proposal or to make a concession.
>
> In the event of the dispute between an employer and an exclusive bargaining representative over the matters that are terms and conditions of employment, the commission shall decide which item(s) are mandatory subjects for bargaining and which item(s) are non-mandatory."

In interpreting the Act, the Examiner is required to consider the precedents of the National Labor Relations Board.2/ The statutory duty to bargain is limited to mandatory subjects of bargaining, i.e., "wages, hours, and terms and conditions of employment." There exists no duty to bargain over matters which are remote from "terms and conditions of employment" or which are regarded as a prerogative of employers or of unions. In Federal Way School District, Decision No. 232-A EDUC (1977), the Commission held educational program and budget to be non-mandatory subjects of bargaining, while salary and seniority were held to be mandatory subjects. An employer's refusal to bargain in part concerning a mandatory subject of bargaining which a union seeks to negotiate is a per se unlawful refusal to bargain.3/

REA's contention is that classroom visitation impacts on the teacher's instructional methods and classroom environment which are conditions of employment and mandatory subjects of bargaining. Therefore, REA argues, the district unlawfully refused to bargain when it unilaterally implemented the classroom visitation policy. The district argues that the matter must be considered educational program policy and its management prerogative.

The REA has not specified how the adopted classroom visitation policy affects the working conditions of teachers other than to offer the conclusionary explanation that it impacts on the teachers' instructional methods and classroom environment. The argument may be that the presence of a stranger in the classroom may have an adverse influence on the students' concentration. Teachers are professionals who likely believe that they know at least as much about the appropriate environment for educating students as does the administration.

The district would be well advised to consider the teachers' concerns. Nevertheless, the district cannot be compelled pursuant to Chapter 41.59 RCW to bargain its decision to permit parents to visit the classroom. This is a policy decision concerning the basic product of the district and which only remotely relates to what is traditionally considered a term or condition of employment.

2/ RCW 41.59.110(2).

3/ NLRB v. Katz, 369 U.S. 736 (1962).

The Washington Supreme Court has indicated:

> "Many educational policy decisions make an impact on a teacher's conditions of employment and the converse is equally true. There is no unwavering line separating the two categories. It is clear, nevertheless, that the legislature denoted an area which was appropriate for teacher-school board bargaining and an area in which such a process would be undesirable."4/

In the context of the Public Employees Collective Bargaining Act, RCW Chapter 41.56, the Executive Director of this Commission said that the "'right to conduct performance evaluations' stems from deeply within the management function" and thus was a non-mandatory subject of bargaining.5/ The same reasoning is applicable to the district's policy decision to permit parents, who are the district's customers, to directly observe the district's performance.

However, any direct impact which a visitation policy has on a teacher's terms and condition of employment must be negotiated. For example, if the policy impacted teachers' hours of employment, that subject would have to be negotiated.6/

The Librarian Reassignment

Until the fall of 1977, the district employed two certificated librarians at each of the district's three high schools. These librarians were represented for purposes of collective bargaining by the REA. One of the librarians in each high school was responsible for all matters pertaining to the school's audio-visual equipment, and audio-visual functions comprised the largest part of the duties of those three librarians. One of these three was also responsible for the social studies section of her high school library. Another supervised her high school's television crew. One did some classroom teaching in addition to her librarian functions.

4/ Spokane Education Association v. Barnes, 83 Wn. 2d 366 (1974), quoting West Hartford Education Association v. DeCaurcey, 162 Conn. 566, 581, (1972).

5/ International Brotherhood of Electrical Workers, Local No. 77 vs. City of Seattle, Decision No. 359 PECB (1978).

6/ In re Parsippany-Troy Hills Education Association, Case No. 77-27 (N.J. PERC. 1976); see Vegas Vic, Inc., 213 NLRB No. 116 (1974).

In the spring of 1977, the district decided to transfer the three "audio-visual librarians" to the district's elementary schools, so that the elementary schools would have full-time librarians rather than half-time librarians. The district inquired of the employees as to whether they would accept a transfer, and two of them accepted the transfer. The REA filed a grievance on behalf of the third employee, and that matter was resolved with a classroom assignment. The district then hired three new employees with the title of "A-V technician" to perform non-instructional tasks at the high schools which the transferred librarians had previously performed. The A-V technicians were not required to have certification and were not in the bargaining unit represented by the REA. Neither the district nor the REA requested negotiations on the matter. However, during the spring of 1977, Patrick Dunham, the Executive Director of the union, informed Kohlwes that its proposed action was illegal and may be a violation of contract.

Citing So. Kitsap School District No. 402, Decision No. 472 PECB (1978), the REA argues that the district's unilateral transfer of unit work to non-unit employees constituted an unlawful refusal to bargain. The So. Kitsap case held that "an employer is obligated to bargain the decision to reassign bargaining unit work to other employees, which decision results in the layoff or termination of bargaining unit employees." In So. Kitsap the union requested negotiations. In the case at hand there is no indication that the REA ever requested negotiations, despite the fact that it had four months notice of the planned change. This failure to request negotiations is fatal to the union's charge. As the U.S. Supreme Court has stated in the context of the National Labor Relations Act:

> "The statute does not compel [the employer] to seek out his employees or request their participation in negotiations for purposes of collective bargaining... To put the employer in default here the employees must at least have signified their desire to negotiate."7/

The NLRB holds that "where a union had actual notice of an employer's intentions at a time when there was sufficient opportunity to bargain prior to implementation of the change, the

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7/ NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939).

employer may not be faulted for failing to afford formal notification."8/ For the above reasons, I find no merit in the REA's allegation that the district refused to bargain the transfer of unit work.

Refusal to Bargain Regarding Substitute Teachers

The REA submitted the following proposal in negotiations with the district for the 1976-77 school year:

> "IV. Substitute Pay
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> A substitute teacher's pay shall be .0035 of the base pay of a beginning teacher's pay (Class 11-0 years of experience). A substitute shall not receive less than 1/2 of a day's pay for a single call and must be paid a full day's pay if assigned to more than 3 hours of duty."

The following proposal was submitted for the 1977-79 contract year:

> "IV. Substitute Pay
>
> The daily rate of substitute teacher pay shall be $41.21/day. Substitutes working less than four (4) hours shall be paid for one-half day; for four (4) hours or more, the pay will be for a full day. Beginning with the 21st consecutive day in the same assignment, a substitute shall be placed on the appropriate position of the salary schedule and paid the same rate as a contracted teacher for the duration of that continuous assignment.
>
> It is further agreed that substitute employees are represented by the Association and shall be accorded all the appropriate provisions of this Contract. Furthermore, such substitute employees shall be subject to the provisions of Article 5 Section B (Representation fee deduction), in the amount as shall be approved in the usual manner by the Association."

The REA contends that the district unlawfully refused to bargain when it refused to negotiate the salary for substitute teachers. The REA argues that the substitutes' representation rights are protected by the Educational Employment Relations Act and that they share a community of interest with the regular teachers and thus should be, and are in the same bargaining unit.

8/ Medicenter, Mid-South Hospital, 221 NLRB 105 (1975). See also U.S. Lingerie Corporation, 170 NLRB 750 (1958); Hartmann Luggage Company, 173 NLRB 1254 (1968).

The district responded that it viewed bargaining concerning terms and conditions of employment for substitute teachers as a non-mandatory subject for bargaining, and it chose not to bargain. It unilaterally set the pay rate for substitute teachers.

In the context of a unit clarification decision, the Executive Director of the Commission held that daily substitutes were excluded from a unit of the certificated staff, while substitutes who work in excess of 20 consecutive days were included. Everett School District No. 2, Decision No. 268 EDUC (1977). Later, in Tacoma School District No. 10, Decision No. 655 EDUC (1979), the Executive Director decided that substitute teachers who were employed by the school district for more than 30 total days during a twelve-month period, were in the certificated teacher bargaining unit. Those employees who worked less than 30 total days or 20 consecutive days were held to be casual employees and thus excluded from the bargaining unit.

The facts in this case regarding substitute teachers are very much like the situation underlying the Tacoma case. The district should consider that case in determining the extent of its bargaining obligation with regard to substitute teachers. However, I am unable to conclude that the district engaged in an unlawful refusal to bargain.

All of the proposals made by the REA regarding substitute teachers encompassed all substitute teachers, and included a large number of substitute teachers who worked less than 30 days during a twelve-month period. During the school years between 1975 and 1978, the district employed between 176 and 195 substitute teachers. A majority of these worked less than 30 days. The REA's proposals encompassed many casual employees who worked only a few days during the year. The district was not obligated to bargain concerning casual employees and committed no unfair labor practice by refusing to respond to the union's proposal.

Further, the district had a reasonable, good faith belief that substitute teachers, who, after all were not previously considered part of the unit, were still not part of the REA's bargaining unit. In City of Richland, Decision No. 279-A PECB (1978), the Commission said:

> "The determination of appropriate bargaining units is a function delegated by the legislature to the Commission.* Unit definition is not a subject for bargaining in the conventional 'mandatory/permissive/ illegal' sense, although parties may agree on units.*"

The matter should be, and still could be resolved by means of a petition for unit clarification filed with this agency.9/

Unilateral Change In The Agreed Upon Contract

The REA represented all certificated teachers within the district when on June 7, 1977, a rival union, The Washington Federation of Teachers, AFL-CIO, filed a petition with the Commission to represent the teachers at a division of the district, the Renton Vocational Technical Institute (R.V.T.I.). On about June 15, 1977, the rival union filed unfair labor practice charges against the district, alleging that the district was unlawfully assisting the REA by negotiating a labor agreement during the pendency of the petition. On June 24, 1977, the district and the REA signed a "Memorandum of Understanding" which provided that, in view of the pending petition and unfair labor practice:

> "THEREFORE, the Renton School District will not engage in collective bargaining for or about R.V.T.I. employees until such time as the aforementioned matters have been adjudicated and a determination has been made validating REA representation rights regarding R.V.T.I. employees.
>
> Further, the REA maintains that it represents the employees at R.V.T.I. for the purpose of collective bargaining.
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> * * *
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> Signing of this document is an acknowledgement of the respective positions of the parties but is not to indicate agreement with those positions."

Negotiations regarding the R.V.T.I. personnel were then suspended.

The district and the REA negotiated a contract covering the other employees for the period September 1, 1977, to August 31, 1979.

9/ I also note that soon after the events in question, the Executive Director ruled in the Everett case that short term daily substitutes were not included with a unit of certificated staff. Later, this position was modified. If the case at hand had been promptly resolved, it would have been decided in the context of the initial ruling, which would have added further support to the district's position.

The parties agreed that Article 2, Section 3 of that collective bargaining agreement would provide:

> "3. 'Employee', 'Certificated Employee', 'Educational Employee' all mean any Certificated Employee of the Renton School District who is represented by the Renton Education Association."

When the district prepared the final copy for signature it had added the following sentence to this section:

> "(EXCEPT R.V.T.I. Employees pending resolution of representation issues before Public Employment Relations Commission)."

The REA objected to this addition. The district refused to remove it because it believed that the clarification was necessary. On October 17, 1977, the REA president signed the agreement with the following statement inserted under her signature:

> "(Definition No. 3 in Article 2 has a special reference to R.V.T.I. added upon request of the District. The Association signs the Contract protesting the aforementioned addition)."

The REA alleges that by refusing to sign a collective bargaining agreement that it had previously agreed to, the district engaged in bad faith bargaining. The district responds that the parenthetical addition was necessary to avoid its committing an unfair labor practice. The district further alleged that the addition represented the understanding of the parties.

The failure of an employer or union to sign a collective bargaining agreement which was previously orally agreed to may be considered an unlawful refusal to bargain.10/ However, in the instant case, the change made by the district was insignificant. The REA has not indicated how it was prejudiced by the change. I can see no harm done to the REA. The change merely recorded the understanding of parties and a remedial order is not warranted.11/

Further, the district's action served to protect itself from arguably committing an unfair labor practice. The National Labor

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10/ Torrington Construction Co., 235 NLRB No. 211 (1978).

11/ Spokane School District No. 81, Decision No. 310 EDUC (1977).

Relations Board has held that an employer may not bargain collectively or execute a collective bargaining agreement with an incumbent union until an outstanding real question concerning representation has been settled by the board.12/

For the above reasons, it would not effectuate the purposes of the Act to conclude that the district's unilateral addition to the contract constituted an unlawful refusal to bargain.

FINDINGS OF FACT

1. Renton School District No. 403 is an employer within the meaning of RCW 41.59.020(5).

2. Renton Education Association is an employee organization within the meaning of RCW 41.59.020(1) and represented certain non-supervisory certificated employees of the district.

3. The classroom visitation policy instituted by the district, without bargaining to impasse with the association, did not directly relate to the wages, hours, and terms and conditions of employment of the employees in the bargaining unit represented by the association.

4. Following the receipt of actual notice that the district was contemplating the transfer of three certificated librarians represented by the association from high schools to elementary schools, and their functional replacement by non-certificated audio-visual aides not eligible for inclusion in the association's bargaining unit under RCW 41.59, the Renton Education Association never requested that the district engage in collective bargaining concerning the matter.

5. The recognition agreement of the parties by which the association is recognized as the exclusive bargaining representative of non-supervisory certificated employees of the district has never specifically included "substitute teachers" in the bargaining unit or made provision for the exclusion of casual employees, and the district has had a reasonable, good faith doubt as to the status of substitute teachers.

12/ Shea Chemical Corp., 121 NLRB 1027 (1958).

6. All demands concerning substitute teachers advanced by the association in negotiations for the 1976-77 and 1977-79 collective bargaining agreements between the parties were for an undivided class of "all substitutes", without distinction between regular part-time and casual employees.

7. Following oral agreement between the district and the association on contract terms for 1977-79, the district insisted on inclusion of a provision in the written collective bargaining agreement excluding employees of the Renton Vocational Technical Institute (R.V.T.I.) from the coverage of the agreement "pending resolution of representation issues before Public Employment Relations Commission." Although said provision reflected the understanding of the parties recorded previously in a separate written statement, the association had not previously agreed to the inclusion of the provision in the collective bargaining agreement.

8. At the time of the events described in paragraph 7 of these findings of fact, there was an outstanding real question concerning representation involving R.V.T.I. employees which had been initiated by a rival employee organization, and that organization had objected to any bargaining between the district and the REA concerning R.V.T.I. employees while that question concerning representation was pending. Further, the parties had an understanding that they were not bargaining with regard to R.V.T.I. employees during negotiations regarding the remainder of the district's certificated staff.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.59 RCW.

2. By the events described in findings of fact 3 through 8, the district did not commit unfair labor practices violative of RCW 41.59.140(1)(a) and (e).

ORDER

On the basis of the foregoing findings of fact and conclusions of law, the undersigned examiner hereby orders that the complaint

against the Renton School District No. 403, be, and it hereby is, dismissed.

DATED at Olympia, Washington, this 28th day of September, 1979.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

By: Alan R. Krebs
ALAN R. KREBS, Examiner